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EX PARTE

February 5, 2003

ELECTRONICALLY FILED

Marlene H. Dortch
Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Re: Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket Nos. 01-338; Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 96-98; Appropriate Framework of Broadband Access to the Internet Over Wireline Facilities, CC Docket No. 02-33.

Dear Ms. Dortch:

I write on behalf of AT&T Corp. ("AT&T") to address recent proposals that, with respect to residential customers, incumbent LECs should be required to unbundle only "copper" loops. As detailed below, implementing *any* "let them eat copper" approach would be exceedingly anticompetitive, precluding voice competition and retarding the deployment of advanced services as well.

At the outset, however, it is important to reiterate that no such restrictions can seriously be considered necessary to "incent" the incumbent LECs to deploy fiber. It is undisputed that the incumbents have already extensively deployed fiber in the feeder and that this investment is justified solely with regard to savings on narrowband network operations.[1] That is why the Commission's Synthesis model properly assumes that incumbents will deploy fiber feeder in their networks whenever it is economic to do so,[2] and some state commissions have estimated

[1] *Ex Parte* Letter from Joan Marsh (AT&T) to Marlene Dortch (Nov. 8, 2002) at 6.

[2] Indeed, the Commission's Synthesis model finds fiber feeder to be the technically and economically efficient choice for over 37% of all non-rural carrier loops. *See*

(continued . . .)

costs and established network element rates on the assumption that *all* feeder plant is fiber. According to ARMIS 43-07 Reports, a third of Tier I LEC loops were already on fiber feeder as of the end of 2001. Commission data also show that working channels on fiber have *doubled* since the establishment of unbundling obligations under the Act.[3] Contrary to the incumbents' rhetoric, fiber deployment is ongoing at a healthy pace. Thus, any policy that jeopardized competition solely to increase already healthy fiber deployment rates would be irrational.[4]

Whatever one's view of broadband investment incentives, however, it is undeniable that a "copper only" approach to unbundling would put an end to meaningful local voice and data competition. These latest copper-only proposals come on the heels of prior incumbent proposals to require competing carriers to collocate at the remote terminal or serving area interface wherever incumbents have deployed remote NGDLC electronics and fiber in their feeder plant. As AT&T and others have demonstrated, and the incumbents were unable to refute, such remote terminal collocation is physically or technically infeasible for numerous reasons.[5] But current proposals that competitive carriers be relegated to spare copper are, if anything, even more clearly unworkable.

Taken to their logical extreme, these proposals would mean that competitive carriers would only be able to access copper outside plant, even in the substantial instances where the incumbent LECs have already deployed fiber in the feeder portion of the loop. Thus, if implemented, these proposals would require competitive carriers to stitch together an all-copper loop by connecting then-existing copper distribution plant and retired-in-place copper feeder plant – if it happens to exist and is still of sufficient quality to sustain minimally acceptable service levels. And, if the incumbent LEC deployed fiber-to-the-home ("FTTH"), a competitive carrier would have to rely on retired-in-place (and questionably maintained) copper facilities for the *entire* loop functionality necessary to reach residential consumers. Competition on the merits is simply not possible under such circumstances.

First, there would be no possibility of competition for many residential customers for the simple reason that usable "spare copper" simply does not exist in many locations.[6] But even if "spare copper" is available where the incumbent has deployed fiber, the quality of the retired

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http://www.fcc.gov/wcb/tapd/hcpm/welcome.html.

[3] *See* ARMIS 43-07 Reports.

[4] *See*, *e.g.*, *Ex Parte* Letter from David Lawson (AT&T) to Marlene Dortch (Feb. 3, 2003).

[5] *See*, *e.g.*, *Ex Parte* Letter from Joan Marsh (AT&T) to Marlene Dortch (Nov. 8, 2002) (copy attached hereto); AT&T Reply at 211-16; AT&T at 195-96; WorldCom at 109-11; Covad, Joint Dec. ¶¶ 37-42; Sprint at 40-41; ALTS at 43-44.

[6] Indeed, the incumbent LECs are actively removing copper that they replace with fiber. *See* http://www.interconnection.bellsouth.com/notifications/network/network_pdf/91083558.pdf.

copper plant is likely to be poor if only because of the natural degradation of unmaintained plant. Obviously, where incumbents have retired copper plant in favor of fiber, they have little incentive to invest in maintaining that plant.[7] This, in turn, creates the virtual certainty that requesting carriers' customers will have more network "troubles" and that the competitors themselves will face higher operating expenses in attempting to resolve these troubles before customers find them intolerable. The fact that the copper plant was replaced by fiber is itself a strong indication that use of copper was not efficient, even for voice services. Furthermore, in situations where capacity congestion in the conduit leading into the local serving office existed, the copper facility may actually have been removed and "spare" copper may not even exist. Because the incumbent LECs have no operational procedures in place to identify whether "spare copper" exists, and no procedures to assign copper feeder to available or abandoned copper distribution, competing carriers would be relegated to more manual procedures that would make today's discriminatory hot cut procedures look elegant and efficient in comparison.

Even where "quality" retired copper plant may exist now, the notion that the incumbent LECs will adequately maintain plant that they no longer use defies common sense. Clearly, part of the economic justification for replacing copper feeder with fiber feeder is the maintenance savings that accrue to the incumbent, due principally to lower trouble rates for customers. Although incumbent LECs have incentives to maintain the facilities that they themselves use to provide voice and data service, even when they have to "share" them with competitive carriers, incumbent LECs clearly have no incentive to maintain plant that they are not using and that will only be used by competitors. Indeed, the incumbents have already made clear that, in their view, the costs of maintaining "two parallel networks" are too high.[8] It is the customers using the copper facilities – customers of incumbent LECs' competitors – who would suffer the consequences of the incumbents' reduced maintenance. And what of the large percentage of the 10 million existing UNE-P customers who could experience service outages if the incumbents were allowed to switch their service to spare copper facilities?

Moreover, in order to create the all-copper connections necessary to replace installed incumbent LEC fiber, the incumbents would have to perform *two* separate customer re-terminations when a competitive carrier wins a customer that is currently served by the incumbent LEC using a hybrid copper-fiber loop and attempts to provision service. The two re-terminations would be required regardless of whether the requesting carrier was employing a

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[7] In fact, some commenters have specifically suggested that an incumbent should be permitted to completely eliminate copper plant that has been replaced by fiber. *See Ex Parte* Letter from William Barr (Verizon) to Chairmen Michael Powell at 7 (Jan. 17, 2003); *Ex Parte* Letter from Jeffrey Linder (Corning) to Magalie Roman Salas (Jan. 31, 2003).

[8] *See Ex Parte* Letter from William Barr (Verizon) to Chairmen Michael Powell at 7 (Jan. 17, 2003). *See also Ex Parte* Letter from Jeffrey Linder (Corning) to Magalie Roman Salas (Jan. 31, 2003).

UNE-P or a UNE-L infrastructure for service. First, and in *all* cases, the incumbent LEC would have to break the existing connection between the copper distribution and fiber feeder connection at the remote terminal (or Serving Area Interface) and establish a new connection between the copper distribution and the retired copper feeder (again, assuming such feeder is available). No practical operational procedures currently exist to accomplish such transfers, and certainly no mechanized procedures exist to support such an undertaking.

Second, once the connectivity is established between the copper distribution and the (hypothetically available and useable) spare copper feeder, the feeder appearance on the main frame would have to be identified and then wired to an analog switch port of the incumbent (in the case of UNE-P) or to the requesting carrier's collocation (in the case of UNE-L). No party seriously disputes that transferring a customer from an IDLC loop to a copper UNE-L is practically difficult and economically impractical, yet IDLC loops would require a transfer to spare copper in order to be served via UNE-P.[9] It is inconceivable that a process that has proven unworkable for the small volumes of analog UNE-L customers could be deemed adequate to support UNE-P market volumes. Even setting aside the impracticality of making the necessary support operational, AT&T has demonstrated that the cost of re-terminating customers requiring analog loops is a substantial barrier to providing facilities-based services even when only *one* such re-termination is required.[10] There can be no serious claim that competition would be possible in an environment in which the number of customer re-terminations is at least doubled.

Just as there are no viable procedures for moving customers from existing IDLC-based loops to spare copper, there are likewise no viable procedures to transfer requesting carriers' customers to reconstituted all-copper loops where FTTH has been deployed.[11] Thus, these proposals as applied to FTTH would also subject competitive carriers to untested and undefined customer re-termination processes and, if past is prologue, potentially a host of new competition-foreclosing charges and practices by the incumbent LECs that would create additional expense, unwarranted provisioning delays, and intolerable customer experiences.

Even assuming these problems away for the purposes of discussion, the "all-copper" proposals suffer from further deficiencies that prevent new entrants from competing for substantial numbers of customers. One of the principal reasons why incumbent LECs have deployed fiber in the loop is to increase the number of customers to whom they can offer DSL

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[9] In this regard, IDLC loops represent a reasonably analogous situation, and such loops have proven a virtually insurmountable barrier to the use of a UNE-L architecture to serve customers. *See* GCI at 9, 49-50; *see also* AT&T at 213 & Gerszberg Dec. ¶¶ 14-16; Z-Tel, Rubino Dec. ¶ 12 n.2.

[10] *See, e.g.*, *Ex Parte* Letter from Joan Marsh (AT&T) to Marlene Dortch (Jan. 17, 2003).

[11] Further, if the drop wire has been disconnected from the distribution facility when the incumbent deployed FTTH, there is potentially a third customer re-termination that must be performed that would require a separate premise visit.

services. That is because the performance capabilities (*i.e.*, maximum attainable data rates) of DSL service decline as a function of increasing copper loop length. As has been repeatedly demonstrated, where fiber is deployed in the loop in order to enable DSL service, relegating competitive carriers to all-copper loops is tantamount to foreclosing them from offering DSL services to those customers.[12]

It is no answer to this physical reality to assert that competitive carriers can simply build their own fiber out to the end point of the copper facility in the incumbent's outside plant (*e.g.*, the Serving Area Interface). Whether composed of copper, fiber, or a copper-fiber hybrid, all local loops are quintessential bottleneck facilities. They require enormous sunk costs and are characterized by steep scale and scope economies that new entrants simply cannot match.[13] Even if the requesting carrier is placed on existing spare copper distribution, these economic realities do not change. The same fixed costs are required and the same investment recovery obligations continue. What does materially change, however, is that an entrant, unlike the incumbent, cannot recover these costs from all customers who will subscribe to DSL services (in either retail or wholesale rates). Instead, entrants can only spread their costs over the fraction of customers they can hope to win – generally a single digit percentage of all customers who could be served by the overbuilt facility. The result would be total loop costs that are inflated by one or two orders of magnitude as compared to the incumbent's costs.

Similarly, competitive carriers cannot match the incumbent LECs' inherent advantages even with regard to "new fiber" built into new developments (*i.e.*, so-called "green field" situations). Because of their huge scale and scope economies and their ability to rely upon their ubiquitously deployed networks, incumbent LECs need only extend their existing network *incrementally* rather than build a whole new network.[14] This is because the incumbent LECs typically (and rationally) deployed excess capacity when any outside plant construction was required. Thus, even if competitive carriers could (hypothetically) deploy new loop *distribution* facilities (the new connections within a particular neighborhood itself) on an equal footing with incumbent LECs, the incumbents will ordinarily be able to utilize their existing fiber feeder and/or transport capacity (*i.e.*, the connection from the neighborhood to the central office) at a negligible per subscriber incremental cost.[15] In contrast, competitive carriers, which do not have ubiquitous fiber outside plant networks, will ordinarily have to deploy new feeder/transport

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[12] *Ex Parte* Letter from Joan Marsh (AT&T) to Marlene Dortch at 6 (Nov. 8, 2002).

[13] *See, e.g.*, AT&T Reply Comments at 92-101 (filed July 17, 2003); Robert D. Willig, "Determining 'Impairment' Using the *Horizontal Merger Guidelines* Entry Analysis" at 8-12 (filed Dec. 3, 2002) ("Willig *Guidelines* Ex Parte"); Ex Parte Letter from Hon. Robert Bork (AT&T) to Chairman Michael Powell at 2-8 (filed Jan. 10, 2003) ("Bork Antitrust Ex Parte").

[14] AT&T Reply, Fea-Giovannucci Reply Dec. ¶ 8.

[15] AT&T Reply at 105.

facilities *as well as new loops* to support a new build.[16] Finally, many incumbent LECs have "omnibus" rights of way, ready access to structures and extensive ability to engage in structure sharing; competitive carriers do not. Thus, competitors must first gain access to the necessary rights of way and structures (which may have to be built new and be un-shared) before they can deploy a fiber conductor. But the competitors are often subject to discriminatory charges and other terms and conditions for obtaining access to necessary rights of way, or, in some circumstances, are denied access to rights of way altogether.[17]

Notably absent from these "all-copper all of the time" proposals is any recognition that entire new regulatory structures would have to be developed and put into place *before* competing carriers could be relegated to copper at the incumbents' whim. To do otherwise and ignore the crippling price and non-price discrimination that would favor the incumbents in such circumstances would be remarkably irresponsible. As noted above, allowing incumbents to insist that their competitors use spare copper would give the incumbent LECs a host of new opportunities to raise their rivals' costs, degrade their service quality and limit their service offerings. In combination, the unconstrained discrimination that would be possible would render competitors unable to use the "all-copper" facilities to compete effectively anywhere they are precluded from access to fiber-enhanced incumbent LEC loops.

Thus, if the Commission should go forward with any of these proposals, which itself would be patently arbitrary and capricious, it must take measures necessary to ensure that competitors and their customers do not bear all of the risks associated with the new and untested procedures that must be developed to implement the proposals. At a minimum, incumbent LECs must not be allowed to move competitive carriers to all-copper loops until *after* the incumbent LECs have provided State commissions with all of the details as to how they will identify the copper facilities to be used and perform the necessary customer re-terminations *and* have demonstrated, through actual (and audited) commercial testing that these processes are feasible and can be performed in a nondiscriminatory, commercially reasonable manner at commercial volumes.

Nor should competitive carriers be relegated to "all-copper loops" until there are State commission-established performance metrics for provisioning and maintaining such loops. Such performance standards would be absolutely necessary to ensure that the performance of the all-copper loops was demonstrably no worse than results for the incumbent when measured in comparison to incumbent LEC POTS, POTS+DSL and DSL (separately measured for incumbent LEC customers on a fiber loop architecture and competitive LEC customers on a copper or copper hybrid loop architecture). It would also be imperative to require incumbent LECs to provide State commissions with the data rates achievable by competitive carriers using all-copper loops in comparison to incumbent LEC services provided on all-copper facilities to

[16] *See* AT&T Reply, Pfau Reply Dec. ¶ 6 n.1.

[17] AT&T Reply, Fea-Giovannucci Reply Dec. ¶ 9.

assure that competitive LECs achieve equivalent throughput at equivalent lengths of copper. And rules would need to be established to require the incumbent LECs to provide competing carriers with fiber access whenever and wherever equal quality spare copper was unavailable.

The Commission would likewise need to recognize that, if these "all-copper" proposals were adopted, the incumbent LECs would have the ability and incentive to use their superior broadband capabilities to impede voice competition. The very purpose of the proposals at issue is to allow the incumbent LECs to offer broadband services that other carriers cannot match, and if the incumbent LECs are allowed to *tie* voice services to these new advanced services, they will be able to foreclose voice competition for customers that demand the advanced services that only the incumbent LECs can provide. Thus, at a minimum, before allowing incumbent LECs to transfer competitive carriers to "all-copper" facilities, the Commission must plainly forbid incumbent LECs from refusing to provide advanced services to customers that take voice services from competitive carriers.[18]

Of course, given the fact that the processes necessary to move competitive carriers to all-copper loops are non-existent, it is impossible at this time to determine in advance all of the ways in which incumbent LECs might seek to use such procedures to harm competitive carriers. Thus, it would be arbitrary to allow incumbent LECs to transfer competitive carriers to all-copper facilities before State commissions have in place expedited dispute resolution procedures, together with remedial procedures, that would subject incumbent carriers to substantial and certain sanctions should they provide competitive carriers with inferior or delayed access to copper loops.

Finally, the Commission would also need to clarify the application of its TELRIC methodology to ensure that incumbent LECs cannot improperly to raise the costs of "all-copper" loops. As an initial matter, some State commissions would need time to reform existing loop rates that were set based upon assumptions that competitive LECs would pay for and have access to fiber. The loop rates adopted by New York Public Service Commission, for example, were set assuming the use of *all* fiber feeder. Moreover, the Commission would have to make clear that the incumbents could not use their all-copper victory as an excuse to *inflate* recurring loop rates (by, for example, claiming that copper feeder is more expensive to deploy and maintain or that per loop rates should be determined based upon only competitive LEC demand rather than all demand, thereby denying competitive LECs the benefits of the incumbents' scale economies). In particular, the Commission would need to make clear that the TELRIC cost of "all-copper" loops should be the *lesser* of the pre-existing analog loop rate (adjusted to remove any inflation caused by fiber assumptions) and a State commission-approved cost assignment to analog services provided via fiber loops. Likewise, the Commission must make clear that incumbents could not use the new all-copper rule to raise nonrecurring loop charges (by, for example, charging more

[18] See New Phone Twist: Switch Local Service and Lose Your DSL, Wall Street Journal, Jan. 30, 2003 at B1

than one loop transfer charge in a UNE-L arrangement or *any* such charge in a UNE-P arrangement).

In the end, of course, the necessity of these entirely new regulatory structures and rules merely confirms that "let them eat copper" is a very bad idea that would lead to more regulation and less competition.

One electronic copy of this notice is being submitted to the Secretary in accordance with section 1.1206 et seq. of the Commission's rules.

Sincerely,

/s/ David L. Lawson

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